93-989

Supreme Court, U.S.
FILED
DEC 20 1993
OFFICE OF THE CLERK

No.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1993

ROBERT EARL CHILDERS

Petitioner,

-vs-

THE STATE OF SOUTH CAROLINA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Melvin L. Roberts
Attorney at Law
P.O. Box 460
York, South Carolina 29745
Attorney for Petitioner
Counsel of Record

QUESTIONS PRESENTED

The South Carolina Supreme Court erred in holding that a sealed investigative report which related to a witnesses attempt to bribe a judicial officer, which was **Brady** material, was still not required to be provided to the Petitioner because its probative value was out weighed by its prejudicial effect or because it was cumulative evidence.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Robert Earl Childers and Respondent, State of South Carolina.1

1 The following individuals were tried with petitioner and none are appealing the South Carolina Supreme Court's decision: Edward Lee Gunn, Sr., Evelyn Gunn, Harold Glenn Moss, Ronald Clayton Carpenter, Hazel Ruby Carpenter, Edward Joe Smith, Kenneth Lee Smith, James Clifford Smith, and Olin Dewitt Thompson.

TABLE OF CONTENTS

QUESTION PRESENTED.....i

PARTIES TO THE PROCEEDING.....ii

TABLE OF AUTHORITIES.....iii

OPINIONS BELOW.....1

JURISDICTION.....2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....2

STATEMENT OF THE CASE.....2

REASONS FOR GRANTING THE WRIT.....6

CONCLUSION.....18

TABLE OF AUTHORITIES

CASES:

Brady v. Maryland, 373 U.S. 83 (1963).....6,7

Giglio v. U. S., 405 U.S. 150 (1972).....7

McDonald v. Illinois, 557 F.2d 596 (7th Cir., 1977); cert. den. 434 U.S. 966 (1978).....11,12

Sellers v. Estelle, 651 F.2d 1074 (5th Cir., 1981).....13

State v. Tompkins, 277 S.W. 2d 587 (Mo., 1955).....17,18

U. S. v. Greichunas, 572 F. Supp. 220 (D.C. Ill., 1983).....13

U. S. v. Persico, 305 F.2d 534 (2nd Cir., 1962).....17

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1993

ROBERT EARL CHILDERS

Petitioner,

-vs-

THE STATE OF SOUTH CAROLINA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF SOUTH CAROLINA

Petitioner, Robert Earl Childers, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of South Carolina entered on August 23, 1993.

OPINION BELOW

The decision of the Supreme Court of the State of South Carolina is Opinion No. 23931 and is reprinted at Appendix A. The Order granting a rehearing is reprinted at Appendix B. The subsequent

decision of the court is Opinion No. 23931 and is reprinted at Appendix C.

JURISDICTION

The judgment of the Supreme Court of the State of South Carolina was entered on August 23, 1993, and a timely petition for rehearing was filed and a new opinion was issued by the Court on September 23, 1993. The jurisdiction of this Court arises under 28 U. S. C. §1257 (a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Fifth Amendment to the United States Constitution provides "No person shall be ... deprived of ... liberty ... without due process of law...".

2. The Fourteenth Amendment of the United States Constitution states "nor shall any state deprive any person of ... liberty ... without due process of law."

STATEMENT OF THE CASE

The petitioner Robert Earl Childers was arrested on August 27, 1989 and charged with violating S. C. Code Ann.

§44-53-370(e)(3)(c). Since over 30 people were jointly indicted by the State Grand Jury in this case the Court treated a motion by any attorney as if all defendants had made it to avoid repatition. A specific Brady motion was made for the sealed SLED Report in November 1989. [a copy of this is printed at Appendix D] The Court denied this motion on January 3, 1990. [a copy of this portion of the transcript is printed at Appendix E]

The main witness against the petitioner was Roxanne Gregory. Petitioner's counsel had learned of existence of a sealed SLED (S. C. Law Enforcement Division) file relating to the witness Roxanne Gregory. [this file is Appendix F and is in the custody of the Clerk] Apparently the Sled file contained information that Roxanne Gregory had promised sexual favors to a

night Magistrate in return for which the night Magistrate agreed to set a personal recognizance bond to release Roxanne Gregory's mother from jail when he had previously refused to set such a bond. The deal apparently later came to light and an investigation followed. The Magistrate resigned after the investigation was completed.

The State refused to produce the sealed file to the defense, but did provide a copy to the judge for an in camera review. At trial Petitioner's counsel attempted to question Roxanne Gregory about this incident but the Court refused to let him proceed. [a copy of this portion of the transcript is printed at Appendix G] At a later conference in Chambers Petitioner's counsel renewed his motion to require the state to produce this file and meade a proffer of what it contained. [a copy of this

portion of the transcript is printed at Appendix H]

The trial judge stated he had reviewed the report in camera and he refused to require the state to provide the sealed report to the Petitioner stating that the prejudice resulting from the introduction of the report would out weigh its probative value and that it was cumulative evidence and that it was not Brady material. [a copy of this portion of the transcript is printed in Appendix H]

On appeal, the South Carolina Supreme Court held that the file was in fact **Brady** material but went on to hold that the evidence was merely cumulative and affirmed the decision of the trial court that the evidence did not have to be provided to the petitioner. On rehearing, the South Carolina Supreme Court affirmed its previous holding.

The issue was raised on behalf of Petitioner in the Brady motion filed in November, 1989 which is at page 815-816 of Volume 2 of the Supplemental Transcript. This is reprinted in Appendix D. Petitioner's attorney personally raised the issue on page 1643 of Volume V of the Transcript, specifically mentioning this court's decision in Brady v. Maryland. 373 U.S. 83 (1963). This portion of the transcript is printed at Appendix H at page

REASONS FOR GRANTING THE WRIT

The South Carolina Supreme Court erred in holding that a sealed investigative report which related to a witnesses attempt to bribe a judicial officer, which was Brady material, was still not required to be provided to the Petitioner because its probative value was out weighed by its prejudicial effect or because it was cumulative evidence.

The holding of the South Carolina Supreme Court that the sealed investigative file did not have to be provided to the petitioner because its probative value was out weighed by it prejudiced effect or because it was cumulative to other evidence denied Petitioner his right to due process of law as required by the Fifth Amendment to the United States Constitution as made applicable to the states through the Fourteenth amendment.

In Brady v. Maryland, 373 U.S. 83 (1963), this Court held, pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, that in a criminal case the state may not withhold exculpatory evidence from the defendant. Exculpatory evidence includes that material which could be used for impeachment of prosecution witnesses. Giglio v. U.S., 405 U.S. 150 (1972)

Petitioner's position is that the sealed investigative report was exculpatory material which would have been used for the impeachment of a prosecution witness and as such, the evidence should have been provided to him so as to enable him to cross examine the witness.

The South Carolina Supreme Court held that the file was indeed **Brady** material but that it was not error on the part of the trial court to refuse to require its delivery to the Petitioner as the probative value of the material in the file was outweighed by its prejudicial effect or because it was merely cumulative to other evidence presented at trial. The Petitioner submits that this finding is violation of the United States Constitution and that it denies criminal defendants a right to a fair and impartial trial both in general and in this case specifically.

It is a basic fact of American jurisprudence that a criminal case is different from a civil case. In a civil case, where a mere preponderance of the evidence is sufficient to win, there is no need to waste valuable judicial resources by the introduction of needlessly cumulative evidence. To use an old analogy, if a trial can be considered as a set of scales, on which each party piles its bricks of evidence, in a civil case, if one side can put one more brick in its pan than the other side, it will win. As such, there is no need to pile on an additional fifteen bricks of cumulative evidence to send the scale crashing to the table in order to win. Thus, the rule denying the introduction of needless cumulative evidence is a reasonable one in a civil case.

However, the situation is vastly different in a criminal case. In a criminal trial, the state must prove the defendant's guilt beyond a reasonable doubt. The state has the burden of producing enough evidence to send its side of the scale crashing to the table. Furthermore, the criminal defendant does not have to prove his innocence but is presumed innocent. The state has the entire burden of proof. If a defendant establishes even one reasonable doubt in the minds of the jury, he will be acquitted.

Not all facts put forward by a defendant to a criminal jury are given the same weight by that jury. Some of the facts may be considered by a jury to be trivial and of no significance in determining the defendant's guilt or innocence. Another fact may be considered by the jury to be the crux of

the matter and of the utmost importance in deciding whether or not a criminal defendant is guilty or innocent. No one, not the defendant, not his attorney, not the prosecutor, and not the judge, is able in advance to read the minds of the jurors and predict what facts they will consider significant. Thus, the failure to allow a defendant to bring a fact in front of a jury can have the most serious consequences for him if the undisclosed fact would have been the one that the jury considered the crucial one in order to find him innocent. A criminal defendant does not receive due process if he is denied the right to fully present his case to the jury. The right of a defendant to prepare the best defense which he can and to bring to the jury's attention the evidence he believes is helpful to his case is constitutionally protected. McDonald v. Illinois, 557

F.2d 596 (7th Cir., 1977); cert. den. 434 U.S. 966 (1978)

In the case at hand, where the South Carolina Supreme Court held that the evidence was Brady material which should have been provided to the defendant, the trial court committed error in holding that the State was not required to provide it to the Defendant and the Defendant was not entitled to use the evidence in cross examination because the prejudice resulting from its introduction would have outweighed its probative value. Petitioner asks who would have been prejudiced besides him? The State could not have been prejudiced by this nor would the witness. The South Carolina Supreme Court referred in its opinions to "the abundance of other evidence" demonstrating the witness' bad character, most of which came from her own mouth while she testified on direct

examination. How could she have been prejudiced more by the admission of this report?

Even if the prejudicial effect of the report outweighed its probative value, it still should have been provided to the defense even if it was inadmissible as evidence. The report was material to the preparation at the Petitioner's defense and the Court should have required its production, regardless of whether it was admissible evidence or not. The fact that evidence is not admissable is no excuse for the prosecutions failure to produce Brady material as even inadmissable evidence must be produced under Brady if it is exculpatory. Sellers v. Estelle, 651 F.2d 1074, 1077 [n.6] (5th Cir., 1981); U. S. v. Greichunas, 572 F. Supp. 220, 230 (D.C. Ill., 1983).

Petitioner should have been allowed to question Roxanne Gregory about this

incident. Petitioner submits that the rule allowing the exclusion of evidence because its "probative value was outweighed by its prejudicial effect" did not apply in this criminal trial as no one could have been prejudiced buy its admission. All evidence which was exculpatory under Brady and its progeny should have been provided to the defense even if it was inadmissable.

As the S. C. Supreme Court stated in its opinion, Roxanne Gregory testified on the stand that she was a liar and a thief; however, the evidence in the sealed investigative report was of a different nature and was not cumulative. As is clear from the Appellant's conviction, even though her testimony documented the witness' contempt and total disregard for the truth and the judicial process and further demonstrated the witness' willingness to participate

in public corruption, and even though the witness testified that she was a liar and a thief the jury believed that once she was on the stand and under oath, she told the truth. Petitioner submits that the evidence in the sealed investigative report would have convinced the jury that even the solemn oath required of a witness testifying in a court of law would not be sufficient to induce this witness to tell the truth.

Roxanne Gregory knew or was presumed to know, that her actions constituted bribing a judicial official and obstruction of justice all crimes but of a different nature than her other, admitted, crimes. This conduct showed her wanton indifference to and contempt of the judicial system. However, she proceeded with her illegal activities in spite of this knowledge. This documented and demonstrated her complete contempt

for and lack of fear of any possible criminal sanction that might be levied against her for tampering with the judicial process. For such a person, merely taking an oath in court would not be sufficient to return her to the paths of righteousness such that they could be expected to tell the truth under oath. Petitioner had the Constitutional right to educate the jury of this fact but was denied this right. The production of the SLED investigative file and cross examination of the witness concerning what it related would have revealed this to the jury. If her testimony regarding the Petitioner had been called into disrepute, the jury would have acquitted the petitioner.

Even if the SLED report was cumulative to other evidence, which Petitioner denies, the court should have required its production. In a criminal case, the

court should be very cautious in excluding evidence that the defense seeks to introduce because the evidence is cumulative. This is especially true in a case such as this where the states case rested entirely on the uncorobarated testimony of alleged co-conspirators as no drugs were over found in Petitioner's actual or constructive control in spite of two searches of his home. The exclusion of Brady material in such a case can create a grave possibility of prejudice to the Petitioner which might not exist in other cases. Here the questioned evidence more defiantly than any thing else produced tended to show that the witness Roxanne Gregory had no fear of lying on the stand under oath and therefore her testimony could not be trusted. U. S. v. Persico, 305 F.2d 534, 539-540 (2nd Cir., 1962); State v. Tompkins, 277 S.W.2d 587, 591 (Mo.,

1955). The South Carolina Supreme Court should have followed this rule and required the production of the sealed report to the defense.

CONCLUSION

The failure of the trial court to require the production of this information and the South Carolina Supreme Court's affirmance of this decision, denied the petitioner due process of law and led to his conviction in violation of the U. S. Constitution.

No.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM 1993

ROBERT EARL CHILDERS

Petitioner,

-vs-

THE STATE OF SOUTH CAROLINA,

Respondent,

APPENDIX
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

MELVIN L. ROBERTS
Attorney at Law
P.O. Box 460
York, S.C. 29745
Counsel of Record

APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Edward Lee Gunn, Sr., Evelyn Gunn, Harold Glenn Moss, Robert Earl Childers, Ronald Clayton Carpenter, Hazel Ruby Carpenter, Edward Joe Smith, Kenneth Lee Smith, James Clifford Smith and Olin Dewitt Thompson,
Appellants.

Appeal from Cherokee County
Robert L. McFadden, Judge

Opinion No. 23931
Heard March 11, 1993 - Filed September 23, 1993

REVERSED IN PART; AFFIRMED IN PART; VACATED IN PART

Dallas D. Ball, of Pickens, for appellants Edward Lee Gunn, Sr. and Evelyn Gunn.

Chief Appellate Defender Daniel T. Stacey, and Chief Deputy Appellate Defender Joseph L. Savitz, III, both of S.C. Office of Appellate Defense, of Columbia, for appellant Harold Glenn Moss.

Melvin L. Roberts, of York, for appellant Robert Earl Childers.

F. Patrick Hubbard, of Columbia; and Keith A. Gatlin, of Rock Hill, for appellants Ronald Clayton Carpenter, Hazel Ruby Carpenter, Edward Joe Smith, Kenneth Lee Smith and James Clifford Smith.

Randall M. Chastain, of Columbia; and Edward E. Saleeby, Jr., of Hartsville, for appellant Olin Dewitt Thompson.

Attorney General T. Travis Medlock, Chief Deputy Attorneys General Cameron M. Currie and Donald J. Zelenka, Assistant General Tracey A. Meyers, all of Columbia, for respondent.

CHANDLER, A.J.: This is a State Grand Jury conspiracy case involving the drug Dilaudid. [1] Count one of the thirty count indictment alleged thirty-three named defendants conspired with others to traffic in Dilaudid in York and Cherokee Counties between 1982 and 1989, while counts two-thirty alleged substantive trafficking offenses. Thirteen of the thirty-three conspiracy defendants went on trial; ten were convicted. This appeal

[1] A painkiller derived from morphine.

consolidates the appeals of those ten individuals. In addition, appellant Lee Gunn was convicted of sixteen counts of trafficking Dilaudid and appellant Harold Moss was convicted on five substantive counts. The issues on appeal are the sufficiency of the conspiracy indictment, the sufficiency of the evidence on that charge, the sufficiency of jurisdictional allegations in the substantive trafficking counts, the trial court's refusal to allow the impeachment of a prosecuting witness, and the trial court's refusal of a jurisdictional jury charge. We vacate Gunn's and Moss's substantive convictions for lack of jurisdiction, but affirm their conspiracy convictions as well as those of appellants Evelyn Gunn and Earl Childers. The conspiracy convictions of the

remaining six appellants are reversed for insufficient evidence. 2

A. Sufficiency of Conspiracy Count

The State chose to indict thirty-three individuals for a conspiracy alleged to have spanned more than seven years. The indictment itself gives no indication of the State's theory or any specifics involved in the conspiracy but instead simply incorporates the language of the trafficking statute in most of its many permutations:

Count One-Conspiracy

(Trafficking in illegal drugs-Dialudid)
S. C. Code Ann. Section 44-53-370(e)(3)(c)

That Lee Edward Gunn, Evelyn S. Gunn, Olin Dewitt Thompson a/k/a "Big O", Bruce Walter Hodges, Robert Francis Leggeri a/k/a "Otis", Olin McDaniel

2 Those six applellants are Ronald Clayton Carpenter, Hazel Ruby Carpenter, Edward Joe Smith, Kenneth Lee Smith, James Clifford Smith and Olin Dewitt Thompson.

Martin, Charles E. Martin a/k/a "Charlie", Lee Edward Gunn, Jr., a/k/a "Junior", Harold Glenn Moss, Barbara Roxanne Gregory, Robert Earl Childers, a/k/a "Sherman", James Clifford Smith, Joe Billy Barrett a/k/a "Bill", a/k/a James David Goodman, Sandra Mayo Mason a/k/a "Sandy", Rodney R. Wagenknecht a/k/a "Possum", Wade Hampton Bright, Jr., Patricia Suzanne Wiley La Barbera, Joseph R. La Barbera, Willie Mae Gregory a/k/a "Billie", Sabrina Rochelle Gregory, Cindy Deese Faile, Christopher Lynn Hunsucker a/k/a "Chris", Betty Sapp Hinson, Melanie Diane Griffin, Melody Dawn Pelzer, Bobby Wade Collins, Frank Soda, Jr., Robert Preston Algeo a/k/a "Bob", Ronald Clayton Carpenter, Hazel Ruby Carpenter, Edward Joe Smith, Kenneth Lee Smith and Timothy Lee Millwood did in Cherokee and York Counties, in or about early 1982 up to and including the date of this

indictment, knowingly, unlawfully and willfully conspire, confederate, agree and have tacit understanding with each other and/or other persons, whose names are both known and unknown to the State Grand Jurors, for the purpose of selling, delivering, or bringing into this State in Cherokee and York Counties, or the knowing actual or constructive possession in Cherokee and York Counties of more than 28 grams of Dilaudid, a narcotic, a derivative of morphine, which is a controlled substance under provisions of Section 44-53-210, Code of Laws of South Carolina (1976), as amended, such conduct not having been authorized by law.

This first issue we address is appellants' contention that this count of indictment is so vague and overbroad that the trial court should have granted their motion to quash. We disagree.

"It is not necessary to detail the evidence of the conspiracy in the indictment nor to recite the facts connecting all the accused with one another in the web of the conspiracy, nor to describe the conspiracy with the same degree of particularity required in describing a substantive offense." State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952). A review of other conspiracy indictments challenged for overbreadth or vagueness shows, however, that those indictments contained more specific allegations the general indictment here. See, e.g., State v. Sweat, 276 S.C. 448, 279, S.E.2d 375 (1981); State v. Fleming, 243 S.C. 263, 133 S.E.2d 800 (1963); State v. McIntire, supra; and State v. Hightower, 221 S.C. 91,69 S.E.2d 363 (1952). It is questionable whether this indictment on its own face sufficiently

apprised the appellants of the charges against them.

It is well settled, however, that in viewing the sufficiency of an indictment we must look at the issue with a practical eye in view of the surrounding circumstances. State v. Adams, 277 S.C. 115, 283 S.E.2d 582 (1981). This indictment was returned by the State Grand Jury. Under its specialized procedure, a defendant is permitted to review, and to reproduce, the transcript of the testimony of the witnesses who appeared before the Grand Jury. S.C. Code Ann.§ 14-7-1700 (Supp. 1992). In light of the availability of this evidence of these appellants, we hold that this count of the indictment is not fatally vague or overbroad.

B. Sufficiency of Substantive Offense Allegations

Appellant Lee Gunn was convicted of sixteen substantive Dilaudid

trafficking offenses and appellant Moss of five counts. The counts alleging these crimes do not contain any allegation that the crimes either transpired inmore than one county or had impact in more than one county. Accordingly, these counts do not sufficiently allege jurisdiction. State v. Wilson, Op. No. 23910 (S.C. Sup. Ct. filed July 19, 1993)(Davis v. Wilson Sh. 20 at p. 25). These convictions and sentences are vacated. [3]

C. Sufficiency of Conspiracy Evidence

Count One alleges a single conspiracy among at least thirty-three individuals to traffic in Dilaudid in York and Cherokee Counties. Under our view of the evidence, the State proved multiple conspiracies, only one of which ("The Gunn Conspiracy") was alleged in the indictment. Accordingly, we hold

[3] There is no such jurisdictional defect in the conspiracy count which alleges the conspiracy took place in two counties.

there was sufficient evidence to submit to the jury the conspiracy charges of those involved in the Gunn Conspiracy. We reverse the convictions of those who are not co-conspirators in that crime, holding they were entitled to directed verdicts of acquittal. A review of the evidence and the law relevant to conspiracy is necessary to explain our conclusion.

The evidence showed that Defendant Bobby Wade Collins, [4] A York County resident, was a major Dilaudid distributor in the Rock Hill-Charlotte area between 1982 and 1985. Collins purchased Dilaudid in Detroit and Florida, and sold it to defendant Joe Billy Barrett, a large scale dealer in Charlotte, and to appellant Ken Smith in York County, and to appellant Ed Smith in

4 Persons charged in the indictment who pled guilty or who were acquitted at trail are referred to in the opinion as defendants. Collins was acquitted.

North Carolina. During this period Collins' girlfriend was defendant Roxanne Gregory (Roxanne), a Dilaudid addict. There is no evidence connecting Collins to the Gunn Conspiracy.

Defendant Cindy Deese Faile (Cindy) was addicted to Dilaudid in 1980. Cindy and defendant Chris Hunsucker (Chris) were members of a Rock Hill group who produced counterfeit drugs and sold them at rock concerts up and down the East Coast. In 1985 Chris and Cindy met a Dilaudid dealer at a Philadelphia concert. Cindy testified she was romantically involved with appellant Moss at this time. Late, in 1986, she introduced Moss and his friend, appellant Lee Gunn, to the Philadelphia connection. She made several trips to Philadelphia with Lee Gunn and Moss to purchase Dilaudids; her payment was always several

pills. Eventually, Cindy was "cut out" of the Philadelphia deal.

Lee Gunn and Harold Moss made a connection with Randy Klinger, the supplier for their original Philadelphia Dilaudid source. Moss with living then with Roxanne, Collin's former girlfriend. Roxanne testified that she made trips to Philadelphia and Florida with Lee Gunn and Moss to purchase large quantities of Dilaudids for distribution in North and South Carolina during 1986 and 1987. Moss and Lee Gunn ceased their association in 1987 or 1988 when Moss learned Lee Gunn was making trips to Philadelphia behind his back. The evidence showed that appellant Earl Childers was a Dilaudid distributor for Lee Gunn, and that Lee's wife Evelyn was actively involved in the Gunn Conspiracy.

After Moss and Lee Gunn ceased doing business together in 1987 or 1988,

each continued separately to import Dilaudid from Philadelphia for distribution and sale in North and South Carolina. During this period Bob and Martha Durbin made most of the trips to Philadelphia for Lee Gunn, while Moss, Roxanne, and members of their family transported the drug for Moss.

There is evidence in the record to support a finding that appellant Cliff Smith was a large scale Dilaudid dealer in South Carolina during the 1980's, and that his brothers, appellants Ed and Ken Smith, aided and abetted Cliff's Dilaudid business. According to the evidence, Cliff's source of drugs was "Tommy", and on occasion, appellant Olin Thompson. Cliff also received drugs from Florida. There is no evidence to connect Cliff to the Gunn Conspiracy.

In addition, there is evidence in the record to support a finding that

appellant Ronald Carpenter and his mother, appellant Hazel Ruth Carpenter, were major distributors of Dilaudid in the Charlotte area during the 1980's. The exact source of the Carpenter's drugs is unclear, although the evidence is susceptible of the inference that Cliff Smith may have supplied them, and that after Moss and Lee Gunn ceased being partners, Moss made more than one large scale sale to Ronnie Carpenter. The evidence is also clear that after 1986 defendant Joe Billy Barrett and especially defendant Sandra Mason were Lee Gunn's distributors in the Charlotte area, and that appellants Ronald and Hazel Carpenter were their main rivals.

Finally, there is evidence of several sales to appellant Olin Thompson, all of which took place in North Carolina. Only one sale was linked to Lee

Gunn. There is also evidence Thompson may have sold Dilaudid to Cliff Smith.

There is evidence that most of those indicted sold drugs at one time or another to the same people, and evidence of occasional transactions between most of the major players. The issue, however, is whether the State's evidence proved the single conspiracy alleged in the indictment, or whether the evidence showed a number of conspiracies. Compare State v. Amerson, Op. No. 23827 (S.C. Sup. Ct. filed March 22, 1993); and State v. Dasher, 278 S.C. 454, 298 S.E.2d 215 (1982).

The State's theory placed Lee Gunn at the "hub" of the alleged conspiracy. In the State's opening argument, the Assistant Attorney General stated "In so far as the South Carolina end of this conspiracy is concerned...Lee Gunn was at the head...." The Assistant

Attorney General acknowledged that Lee Gunn began to conspire in 1986, even though the indictment alleged the conspiracy commenced in 1982, and that Moss's agreement with Lee Gunn lasted only until 1987, but asserted Moss continued to traffic in Dilaudid independent of Lee Gunn after that time. The opening statement identified Cliff Smith as a distributor for Lee Gunn for a limited period of time 5 , and linked Cliff's brothers Ed and Ken to Cliff. Appellants Hazel and Ronnie Carpenter were identified as large scale dealers, but no basis for linking them to the Gunn Conspiracy was suggested. Finally, appellant Thompson was identified as a person who occasionally purchased Dilaudid in North Carolina for resale.

5 We find no evidence in the record to support his assertion.

We do not suggest that the State's opening argument was in any way evidence in the case, but it is the only device available under the circumstances for determining the State's theory. We discern that theory to be a wheel conspiracy [6], with Lee Gunn at the "hub" and with spokes radiating to appellant Earl Childers, to appellant Cliff Smith, to appellant Olin Thompson, and to defendants Barrett and Mason. Moss was originally at the hub, but then split off into an independent arrangement with the Philadelphia suppliers. Cliff's brothers Ed and Ken are linked to Cliff, but the relationship between the Carpenters and Gunn, as well as between certain other defendants, remains unexplained.

6 See United States v. Kenny, 645 F.2d 1323 (9th Cir. 1981), for a discussion of a wheel conspiracy.

A conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or of achieving by criminal or unlawful means an object that is neither criminal nor unlawful. State v. Ameker, 73 S.C. 330, 53 S.E. 484 (1906). The gravamen of the offense of conspiracy is the agreement or combination. State v. Dasher, supra. Thus, we focus here on the sufficiency of the evidence of an agreement between the alleged conspirators, and not, as the importation and distribution of Dilaudid in a defined geographic area. As the Tenth Circuit has said:

What is required is a shared, single criminal objective, not just similar or parallel objectives between similarly situated people .... It is not enough that a group of people separately intend to distribute drugs in a single area,

nor enough that their activities occasionally or sporadically place them in contact with each other. People in the same industry in the same locale (even competitors) can occasionally be expected to interact with each other without thereby becoming coconspirators. What is needed is proof they intended to act <u>together</u> for their <u>shared mutual benefit</u> the scope of the conspiracy charged. <u>United States v. Evans</u>, 970 F.2d 663 (10th Cir. 1992) (emphasis in original).

In reviewing the sufficiency of the evidence we view it, as we must, in the light most favorable to the State. <u>State v. Sullivan</u>, 277 S.C. 35, 282 S.E.2d 838 (1981). In viewing this evidence, however, we must exercise caution to ensure the proof is not obtained "by piling inference upon inference." <u>Direct Sales Co. v. United States</u>, 319 U.S. 703,

63 S.Ct, 1265, 87 L.Ed. 1674 (1943). Proof of a buyer-seller relationship, without more, is inadequate to tie the buyer to a larger conspiracy, United States v. Fox, 902 F.2d 1508 (10th Cir. 1990), as is mere association with members of the conspiracy. State v. Sullivan, supra. This is so because "guilt...remains individual and personal...(and) is not a matter of mass application." Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). We agree however, that "an agreement to distribute drugs can sometimes 'rationally be inferred' from 'frequent contacts' among the defendants and from 'their joint appearances at transactions and negotiations.'" United States v. Evans, supra.

In addition to relying on evidence of specific drug transactions between the alleged coconspirators, the

State relies on phone records showing communication between them to prove the conspiracy. The defendants in this case share a common interest not only in Dilaudid, but in the car repair and sales business, and in the business of raising gamecocks. In addition, there is evidence of personal friendships between various defendants and their family members. Accordingly, under the circumstances of this case, we attach no evidentiary significance to the voluminous phone records showing contact between the alleged coconspirators since there is no evidence of the content of those calls. 7

As we stated above, the evidence that during 1986 and 1987 appellants Lee Gunn, Moss, Evelyn Gunn and Childers

7 We do find the phone tap evidence obtained in Philadelphia probative but we do not reach the admissability of this particular evidence since it is cumulative to other evidence in the record. State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978).

conspired together to import and sell Dilaudid is sufficient to withstand their directed verdict motions. We find the only evidence in the record shows that appellant Moss withdrew from the conspiracy in 1987 or 1988, and that this withdrawal was communicated to all coconspirators. See State v. Woods, 189 S.C. 281, 1 S.E.2d 190 (1939). Consequently, transactions between Moss and others after this time cannot be used to connect those individuals to the Gunn Conspiracy. Accordingly, we do not consider the alleged sale to Olin Thompson in Gastonia, nor the alleged transactions between Moss and appellants Ronnie and Hazel Carpenter since they occurred after 1988. Unlike the State, we find no evidence that Moss ever rejoined the Gunn Conspiracy.

Reviewing the remaining evidence against Thompson, we find only evidence

of a single possible sale by Gunn to Thompson near Grover, North Carolina. A single sale, without more, does not make Thompson part of the Gunn Conspiracy. United States v. Fox, supra. Thompson is entitled to a directed verdict.

We reached a similar conclusion with respect to appellants Ronnie and Hazel Carpenter. There is ample evidence they dealt in Dilaudid (mostly we note, in North Carolina) but no evidence they were part of the Gunn Conspiracy. Similarly, there is no evidence to connect the Smith brothers to the Gunn Conspiracy. These five appellants are entitled to directed verdicts

Applying the test outlined in State v.Amerson, supra, 8 we hold the

8 The factors to be applied in determining whether, in the totality of the circumstances, the proof shows one or more conspiracies are (1) the time periods involved; (2) the places where the conspiracy(ies) allegedly occurred; (3) the persons charged; (4) the overt

evidence showed several conspiracies where the indictment alleged only one. The State, relying on federal cases, argues that before any appellant is entitled to relief because of this variance between the crime charged and the offense proved, he must prove sufficient prejudice. This argument fails to comprehend the difference between federal and state law on the issues of variance. In South Carolina, "[I]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." State v. Cody, 180 S.C. 417, 186 S.E. 165 (1936). A material variance between charge and proof entitles the defendant to a

acts or other descriptions of the offenses alleged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated.

directed verdict; such a variance is not material if it "is not an element of the offense." State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981). Clearly a variance between the conspiracy charged and the conspiracy proved constitutes a material variance.

D. Prosecution Witness Impeachment

The State's crucial witness was defendant Roxanne Gregory. As its brief acknowledges, "[a]ll Appellants, however, had one thing in common: all dealt direct with Roxanne Gregory...." Appellants contend the trial court committed reversible error in refusing to allow them to inspect a SLED file and to use its contents to impeach Roxanne. We disagree.

In 1986, Roxanne's mother was arrested on drug charges. Her initial cash bond was reduced to a personal recognizance bond by a magistrate.

Following a SLED investigation into this bond reduction, the magistrate resigned. During trial, appellants' counsel became aware of this incident, and of allegations that the SLED investigation found the bond reduction came about after Roxanne agreed to a sexual encounter with the magistrate. Appellants sought to inspect the SLED file and to use its contents to impeach Roxanne.

The trial judge inspected the file in camera and refused to permit appellants access to it. He ruled the prejudicial content of the file outweighed its probative value, and held its impeachment value was merely cumulative to other available evidence impeaching Roxanne. He also ruled the material was not Brady [9] material. We disagree.

[9] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963).

Impeachment evidence must be disclosed pursuant to a Brady request. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); State v. Bryant, ____ S.C. ____, 415 S.E.2d 806 (1992). Our review of this file convinces us that disclosure of it to the appellants would have provided them with a good faith basis for seeking to impeach Roxanne for false swearing, if not for attempted bribery or bribery of a judicial officer. See State v. McGuire, 272 S.C. 547, 253 S.E.2d 103 (1979)(a witness may be impeached by past conduct which fairly tends to affect her credibility if the questioner has a good faith basis for asking the question). The trial judge erred in weighing the evidence's prejudicial impact against its probative value where the issue was whether to allow a critical witness's, rather than a defendant's impeachment.

The State argues, however, that the evidence in the SLED file was merely cumulative to other evidence impeaching Roxanne's credibility. At trial, she admitted she as a drug user, that she initially lied to officers about her knowledge and involvement in the Dilaudid business because she was a junkie, that she had prior convictions for possession of marijuana and forgery, and that when she was a junkie she would, and had, done anything to support her habit, including lying, cheating, stealing and prostitution. Failure to disclose Brady material is reversible error only when its omission deprives the defendant of a fair trial. State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981). The exclusion of impeaching evidence is not prejudicial where it has no meaningful impact on a witness's credibility. State v. Ferguson, 300 S.C. 408, 388 S.E.2d 642

(1990). In light of the abundance of other evidence detailing Roxanne's unabashed disrespect for the law, appellants cannot establish that the trial court's ruling denied them a fair trial. State v. Thompson, supra; State v. Ferguson, supra.

E. The Conclusion

We take this occasion to remind prosecutors of the pitfalls inherent in mass conspiracy trials. More than forty years ago this Court stated, "It is always cumbersome to try a great number of defendants at one time....With such a large number [of defendants] there might be a danger of some of them being lost sight of by the jury, and their case considered by the jury in a vague way." State v. McIntire, supra.

Here, the State concedes the evidence produced at trial showed a number of "relationships intertwined in a

confusing jumble of ways." As an appellate tribunal, we have had the opportunity to searchingly review the voluminous transcript generated by this prosecution, and to reflect upon the numerous issues raised. This was not a luxury afforded the trial judge or the jury. Separate indictments, with separate trials, and a sharper focus on the alleged conspirator's agreement, would have aided in the refinement of the State's case. Sec, e.g., United States v. Sperling, 506 F.2d 1323 (2nd Cir. 1974).

As the United State Supreme Court cautioned:

> There are times when necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their

conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.

Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere conveniences or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not

become careless or complacent when that fashion has become rampant over the earth.

Kotteakos v. United States, supra.

The State Grand Jury has undertaken a difficult mission, requiring the exercise of caution and discretion to insure justice is achieved.

We reverse the conspiracy convictions of appellants Olin Thompson, Ronnie Carpenter, Hazel Carpenter, Cliff Smith, Ed Smith, and Ken Smith for lack of evidence. We affirm the conspiracy convictions of appellants Lee Gunn, Evelyn Gunn, Harold Moss and Earl Childers. We vacate the substantive trafficking convictions of appellants Lee Gunn and Harold Moss. Accordingly, these appeals are

REVERSED IN PART, AFFIRMED IN PART, AND VACATED IN PART.

Harwell, C.J., Chandler, Toal and Moore, JJ, concur.

Finney, A.J., dissenting.

FINNEY, A.J. (Dissenting in part): I respectfully dissent from so much of the majority opinion as affirms the conspiracy convictions of appellants Edward Lee Gunn, Sr., Evelyn Gunn, Earl Childers, and Harold Moss. I would reverse their convictions for conspiracy on the grounds that the trial judge erred in refusing to allow appellants to inspect a South Carolina Law Enforcement Division (SLED) file on prosecution witness Roxanne Gregory and to use evidence revealed in the file for the purpose of impeaching the witness.

The majority concedes error on the part of the trial judge in holding that the SLED file evidence was not subject to disclosure under Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 2d 215 (1963); and that the trial judge erred in weighing the prejudicial impact against the probative value of the controverted

evidence where the issue was impeachment of a critical witness - instead of a defendant. See United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985); State v. Bryant, ___ S.C. ___, 415 S.E.2d 806 (1992); State v. McGuire, 272 S.C. 547, 253 S.E.2d 103 (1979). Nonetheless, the majority affirms based upon its finding that the appellants failed to establish prejudice by the trial court's rulings. The majority concludes that the excluded evidence was cumulative to other testimony by the witness that she was a drug user, had lied to police officers, and that when she was a junkie, she would do and had done anything to support her habit, including lying, cheating, stealing and prostitution.

The evidence at issue surrounds the arrest of Roxanne's mother in 1986 on drug charges and the magistrate's

reduction of the mother's initial cash bond to a personal recognizance. The magistrate resigned after an ensuing SLED investigation. Evidence in the SLED file indicated that the bond was reduced after Roxanne agreed to a sexual encounter with the magistrate. The trial judge reviewed the evidence in camera and refused to allow the appellants to inspect the SLED file or to use evidence from the file to impeach Roxanne.

I discern a pivotal distinction between the specific, documented SLED file evidence and a broad, ambiguous admission by an admitted drug user that she had lied about her involvement in the drug business, that she had prior drug-related and forgery convictions, and that she would do and had done anything to support her habit while she was a junkie.

Based upon a finding of cumulativeness, the trial court excluded

the SLED file evidence - which tended to show that the witness had intentionally manipulated the judicial system to gain an advantage; that her questionable action had occurred even as the unlawful conspiracy was ongoing; and that there was an inference that she would engage in illegal or harmful conduct with a calculated, reckless disregard for the interests of others. Conversely, the admitted testimony that the trial court found to be ample on the issue of Roxanne's credibility constituted little more than a confession to the stereotypical vices generally associated with the chronic drug dependency of a "junkie."

I am convinced that any act tending to demonstrate a willingness to undermine the judicial system is far more egregious than other misdeeds and evinces a greater degree of culpability. In my view, the

excluded evidence has unique relevance to Roxanne's character with regard to the case on trial, and the appellants were entitled to disclosure and use of the evidence for witness impeachment.

The complex, bloated prosecution growing out of this case spanning from 1982 to 1989, involving several states, multiple counties in South Carolina, and numerous individuals tended to obscure significant issues and resulted in a convoluted trial. However, two facts are clear and undisputed; one, that there was a single constant in the conspiracy - each of the appellants had dealings with Roxanne Gregory; and two, that Roxanne was a crucial witness for the state. Given the fact that a substantial portion of the evidence required to establish a conspiracy is - by nature - subjective, witness credibility assumes paramount importance in arriving at the truth. See

State v. Dasher, 278 S.C. 454, 298 S.E.2d 215 (1982).

I would hold that the appellants were prejudiced by the trial court's failure to permit counsel for the appellants to examine the SLED file and that their inability to conduct impeaching cross examination of Roxanne based upon pertinent evidence from the SLED file denied the appellants the right to a fair trial. I would reverse appellants' convictions for conspiracy.

APPENDIX B

THE SUPREME COURT OF SOUTH CAROLINA

The State,

Respondent,

v.

Edward Lee Gunn, Sr., Evelyn Gunn, Harold Glenn Moss, Robert Earl Childers, Ronald Clayton Carpenter, Hazel Ruby Carpenter, Edward Joe Smith, Kenneth Lee Smith, James Clifford Smith, and Olin Dewitt Thompson,

Appellants.

O R D E R

We grant appellant's petitions for rehearing in order to address an additional issue. The earlier opinion is therefore withdrawn and the following substituted therefore.

IT IS SO ORDERED.

s/ David W. Harwell C.J.

s/ A. Lee Chandler A.J.

s/ Jean H. Toal A.J.

s/ James E. Moore A.J.

Finney, A.J., dissenting

Columbia, South Carolina
September 23, 1993

APPENDIX C

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State,

Respondent,

v.

Edward Lee Gunn, Sr., Evelyn Gunn, Harold Glenn Moss, Robert Earl Childers, Ronald Clayton Carpenter, Hazel Ruby Carpenter, Edward Joe Smith, Kenneth Lee Smith, James Clifford Smith and Olin Dewitt Thompson,

Appellants.

Appeal from Cherokee County
Robert L. McFadden, Judge

Opinion No. 23931
Heard March 11, 1993 - Filed
September 23, 1993

REVERSED IN PART; AFFIRMED IN PART;
VACATED IN PART

Dallas D. Ball, of Pickens, for appellants Edward Lee Gunn, Sr. and Evelyn Gunn.

Chief Appellate Defender Daniel T. Stacey, and Chief Deputy Appellate Defender Joseph L. Savitz, III, both of S.C. Office of Appellate Defense, of Columbia, for appellant Harold Glenn Moss.

Melvin L. Roberts, of York, for appellant Robert Earl Childers.

F. Patrick Hubbard, of Columbia; and Keith A. Gatlin, of Rock Hill, for appellants Ronald Clayton Carpenter, Hazel Ruby Carpenter, Edward Joe Smith, Kenneth Lee Smith and James Clifford Smith.

Randall M. Chastain, of Columbia; and Edward E. Saleeby, Jr., of Hartsville, for appellant Olin Dewitt Thompson.

Attorney General T. Travis Medlock, Chief Deputy Attorneys General Cameron M. Currie and Donald J. Zelenka, Assistant General Tracey A. Meyers, all of Columbia, for respondent.

CHANDLER, A.J.: This is a State Grand Jury conspiracy case involving the drug Dilaudid. [1] Count one of the thirty count indictment alleged thirty-three named defendants conspired with others to traffic in Dilaudid in York and Cherokee Counties between 1982 and 1989, while counts two-thirty alleged substantive trafficking offenses. Thirteen of the thirty-three conspiracy defendants went on trial; ten were convicted. This appeal consolidates the appeals of those ten

1 A painkiller derived from morphine.

individuals. In addition, appellant Lee Gunn was convicted of sixteen counts of trafficking Dilaudid and appellant Harold Moss was convicted on five substantive counts. The issues on appeal are the sufficiency of the conspiracy indictment, the sufficiency of the evidence on that charge, the sufficiency of jurisdictional allegations in the substantive trafficking counts, the trial court's refusal to allow the impeachment of a prosecuting witness, and the trial court's refusal of a jurisdictional jury charge. We vacate Gunn's and Moss's substantive convictions for lack of jurisdiction, but affirm their conspiracy convictions as well as those of appellants Evelyn Gunn and Earl Childers. The conspiracy convictions of the remaining six appellants are reversed for insufficient evidence. 2

2 Those six applellants are Ronald Clayton Carpenter, Hazel Ruby Carpenter,

A. Sufficiency of Conspiracy Count

The State chose to indict thirty-three individuals for a conspiracy alleged to have spanned more than seven years. The indictment itself gives no indication of the State's theory or any specifics involved in the conspiracy but instead simply incorporates the language of the trafficking statute in most of its many permutations:

Count One-Conspiracy

(Trafficking in illegal drugs-Dialudid)

S. C. Code Ann. Section 44-53-370(e)(3)(c)

That Lee Edward Gunn, Evelyn S. Gunn, Olin Dewitt Thompson a/k/a "Big O", Bruce Walter Hodges, Robert Francis Leggeri a/k/a "Otis", Olin McDaniel Martin, Charles E. Martin a/k/a "Charlie", Lee Edward Gunn, Jr., a/k/a "Junior", Harold Glenn Moss, Barbara Edward Joe Smith, Kenneth Lee Smith, James Clifford Smith and Olin Dewitt Thompson.

Roxanne Gregory, Robert Earl Childers, a/k/a "Sherman", James Clifford Smith, Joe Billy Barrett a/k/a "Bill", a/k/a James David Goodman, Sandra Mayo Mason a/k/a "Sandy", Rodney R. Wagenknecht a/k/a "Possum", Wade Hampton Bright, Jr., Patricia Suzanne Wiley La Barbera, Joseph R. La Barbera, Willie Mae Gregory a/k/a "Billie", Sabrina Rochelle Gregory, Cindy Deese Faile, Christopher Lynn Hunsucker a/k/a "Chris", Betty Sapp Hinson, Melanie Diane Griffin, Melody Dawn Pelzer, Bobby Wade Collins, Frank Soda, Jr., Robert Preston Algeo a/k/a "Bob", Ronald Clayton Carpenter, Hazel Ruby Carpenter, Edward Joe Smith, Kenneth Lee Smith and Timothy Lee Millwood did in Cherokee and York Counties, in or about early 1982 up to and including the date of this indictment, knowingly, unlawfully and willfully conspire, confederate, agree and have tacit understanding with each

other and/or other persons, whose names are both known and unknown to the State Grand Jurors, for the purpose of selling, delivering, or bringing into this State in Cherokee and York Counties, or the knowing actual or constructive possession in Cherokee and York Counties of more than 28 grams of Dilaudid, a narcotic, a derivative of morphine, which is a controlled substance under provisions of Section 44-53-210, Code of Laws of South Carolina (1976), as amended, such conduct not having been authorized by law.

This first issue we address is appellants' contention that this count of indictment is so vague and overbroad that the trial court should have granted their motion to quash. We disagree.

"It is not necessary to detail the evidence of the conspiracy in the indictment nor to recite the facts

connecting all the accused with one another in the web of the conspiracy, nor to describe the conspiracy with the same degree of particularity required in describing a substantive offense." State v. McIntire, 221 S.C. 504, 71 S.E.2d 410 (1952). A review of other conspiracy indictments challenged for overbreadth or vagueness shows, however, that those indictments contained more specific allegations the general indictment here. See, e.g., State v. Sweat, 276 S.C. 448, 279, S.E.2d 375 (1981); State v. Fleming, 243 S.C. 263, 133 S.E.2d 800 (1963); State v. McIntire, supra; and State v. Hightower, 221 S.C. 91,69 S.E.2d 363 (1952). It is questionable whether this indictment on its own face sufficiently apprised the appellants of the charges against them.

It is well settled, however, that in viewing the sufficiency of an

indictment we must look at the issue with a practical eye in view of the surrounding circumstances. State v. Adams, 277 S.C. 115, 283 S.E.2d (1981). This indictment was returned by the State Grand Jury. Under its specialized procedure, a defendant is permitted to review, and to reproduce, the transcript of the testimony of the witnesses who appeared before the Grand Jury. S.C. Code Ann.§ 14-7-1700 (Supp. 1992). In light of the availability of this evidence of these appellants, we hold that this count of the indictment is not fatally vague or overbroad.

B. Sufficiency of Substantive Offense Allegations

Appellant Lee Gunn was convicted of sixteen substantive Dilaudid trafficking offenses and appellant Moss of five counts. The counts alleging these crimes do not contain any allegation that the crimes either transpired in more than

one county or had impact in more than one county. Accordingly, these counts do not sufficiently allege jurisdiction. State v. Wilson, Op. No. 23910 (S.C. Sup. Ct. filed July 19, 1993)(Davis v. Wilson Sh. 20 at p. 25). These convictions and sentences are vacated. 3

C. Sufficiency of Conspiracy Evidence

Count One alleges a single conspiracy among at least thirty-three individuals to traffic in Dilaudid in York and Cherokee Counties. Under our view of the evidence, the State proved multiple conspiracies, only one of which ("The Gunn Conspiracy") was alleged in the indictment. Accordingly, we hold there was sufficient evidence to submit to the jury the conspiracy charges of those involved in the Gunn Conspiracy. We reverse the convictions of those who are

3 There is no such jurisdictional defect in the conspiracy count which alleges the conspiracy took place in two counties.

not co-conspirators in that crime, holding they were entitled to directed verdicts of acquittal. A review of the evidence and the law relevant to conspiracy is necessary to explain our conclusion.

The evidence showed that Defendant Bobby Wade Collins, [4] a York County resident, was a major Dilaudid distributor in the Rock Hill-Charlotte area between 1982 and 1985. Collins purchased Dilaudid in Detroit and Florida, and sold it to defendant Joe Billy Barrett, a large scale dealer in Charlotte, and to appellant Ken Smith in York County, and to appellant Ed Smith in North Carolina. During this period Collins' girlfriend was defendant Roxanne Gregory (Roxanne), a Dilaudid addict.

4 Persons charged in the indictment who pled guilty or who were acquitted at trail are referred to in the opinion as defendants. Collins was acquitted.

There is no evidence connecting Collins to the Gunn Conspiracy.

Defendant Cindy Deese Faile (Cindy) was addicted to Dilaudid in 1980. Cindy and defendant Chris Hunsucker (Chris) were members of a Rock Hill group who produced counterfeit drugs and sold them at rock concerts up and down the East Coast. In 1985 Chris and Cindy met a Dilaudid dealer at a Philadelphia concert. Cindy testified she was romantically involved with appellant Moss at this time. Late, in 1986, she introduced Moss and his friend, appellant Lee Gunn, to the Philadelphia connection. She made several trips to Philadelphia with Lee Gunn and Moss to purchase Dilaudids; her payment was always several pills. Eventually, Cindy was "cut out" of the Philadelphia deal.

Lee Gunn and Harold Moss made a connection with Randy Klinger, the supplier for their original Philadelphia Dilaudid source. Moss with living then with Roxanne, Collin's former girlfriend. Roxanne testified that she made trips to Philadelphia and Florida with Lee Gunn and Moss to purchase large quantities of Dilaudids for distribution in North and South Carolina during 1986 and 1987. Moss and Lee Gunn ceased their association in 1987 or 1988 when Moss learned Lee Gunn was making trips to Philadelphia behind his back. The evidence showed that appellant Earl Childers was a Dilaudid distributor for Lee Gunn, and that Lee's wife Evelyn was actively involved in the Gunn Conspiracy.

After Moss and Lee Gunn ceased doing business together in 1987 or 1988, each continued separately to import Dilaudid from Philadelphia for distribution and

sale in North and South Carolina. During this period Bob and Martha Durbin made most of the trips to Philadelphia for Lee Gunn, while Moss, Roxanne, and members of their family transported the drug for Moss.

There is evidence in the record to support a finding that appellant Cliff Smith was a large scale Dilaudid dealer in South Carolina during the 1980's, and that his brothers, appellants Ed and Ken Smith, aided and abetted Cliff's Dilaudid business. According to the evidence, Cliff's source of drugs was "Tommy", and on occasion, appellant Olin Thompson. Cliff also received drugs from Florida. There is no evidence to connect Cliff to the Gunn Conspiracy.

In addition, there is evidence in the record to support a finding that appellant Ronald Carpenter and his mother, appellant Hazel Ruth Carpenter,

were major distributors of Dilaudid in the Charlotte area during the 1980's. The exact source of the Carpenter's drugs is unclear, although the evidence is susceptible of the inference that Cliff Smith may have supplied them, and that after Moss and Lee Gunn ceased being partners, Moss made more than one large scale sale to Ronnie Carpenter. The evidence is also clear that after 1986 defendant Joe Billy Barrett and especially defendant Sandra Mason were Lee Gunn's distributors in the Charlotte area, and that appellants Ronald and Hazel Carpenter were their main rivals.

Finally, there is evidence of several sales to appellant Olin Thompson, all of which took place in North Carolina. Only one sale was linked to Lee Gunn. There is also evidence Thompson may have sold Dilaudid to Cliff Smith.

There is evidence that most of those indicted sold drugs at one time or another to the same people, and evidence of occasional transactions between most of the major players. The issue, however, is whether the State's evidence proved the single conspiracy alleged in the indictment, or whether the evidence showed a number of conspiracies. Compare State v. Amerson, Op. No. 23827 (S.C. Sup. Ct. filed March 22, 1993); and State v. Dasher, 278 S.C. 454, 298 S.E.2d 215 (1982).

The State's theory placed Lee Gunn at the "hub" of the alleged conspiracy. In the State's opening argument, the Assistant Attorney General stated "In so far as the South Carolina end of this conspiracy is concerned...Lee Gunn was at the head...." The Assistant Attorney General acknowledged that Lee Gunn began to conspire in 1986, even though the

indictment alleged the conspiracy commenced in 1982, and that Moss's agreement with Lee Gunn lasted only until 1987, but asserted Moss continued to traffic in Dilaudid independent of Lee Gunn after that time. The opening statement identified Cliff Smith as a distributor for Lee Gunn for a limited period of time,5 and linked Cliff's brothers Ed and Ken to Cliff. Appellants Hazel and Ronnie Carpenter were identified as large scale dealers, but no basis for linking them to the Gunn Conspiracy was suggested. Finally, appellant Thompson was identified as a person who occasionally purchased Dilaudid in North Carolina for resale.

We do not suggest that the State's opening argument was in any way evidence in the case, but it is the only device

5 We find no evidence in the record to support his assertion.

available under the circumstances for determining the State's theory. We discern that theory to be a wheel conspiracy 6 , with Lee Gunn at the "hub" and with spokes radiating to appellant Earl Childers, to appellant Cliff Smith, to appellant Olin Thompson, and to defendants Barrett and Mason. Moss was originally at the hub, but then split off into an independent arrangement with the Philadelphia suppliers. Cliff's brothers Ed and Ken are linked to Cliff, but the relationship between the Carpenters and Gunn, as well as between certain other defendants, remains unexplained.

A conspiracy is a combination or agreement between two or more persons for the purpose of accomplishing a criminal or unlawful object, or of achieving by criminal or unlawful means an object that

6 See United States v. Kenny, 645 F.2d 1323 (9th Cir. 1981), for a discussion of a wheel conspiracy.

is neither criminal nor unlawful. State v. Ameker, 73 S.C. 330, 53 S.E. 484 (1906). The gravamen of the offense of conspiracy is the agreement or combination. State v. Dasher, supra. Thus, we focus here on the sufficiency of the evidence of an agreement between the alleged conspirators, and not, as the importation and distribution of Dilaudid in a defined geographic area. As the Tenth Circuit has said:

What is required is a shared, single criminal objective, not just similar or parallel objectives between similarly situated people .... It is not enough that a group of people separately intend to distribute drugs in a single area, nor enough that their activities occasionally or sporadically place them in contact with each other. People in the same industry in the same locale (even competitors) can occasionally be

expected to interact with each other without thereby becoming coconspirators. What is needed is proof they intended to act together for their shared mutual benefit the scope of the conspiracy charged. United States v. Evans, 970 F.2d 663 (10th Cir. 1992) (emphasis in original).

In reviewing the sufficiency of the evidence we view it, as we must, in the light most favorable to the State. State v. Sullivan, 277 S.C. 35, 282 S.E.2d 838 (1981). In viewing this evidence, however, we must exercise caution to ensure the proof is not obtained "by piling inference upon inference." Direct Sales Co. v. United States, 319 U.S. 703, 63 S.Ct, 1265, 87 L.Ed. 1674 (1943). Proof of a buyer-seller relationship, without more, is inadequate to tie the buyer to a larger conspiracy, United States v. Fox, 902 F.2d 1508 (10th Cir.

1990), as is mere association with members of the conspiracy. State v. Sullivan, supra. This is so because "guilt...remains individual and personal...(and) is not a matter of mass application." Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). We agree however, that "an agreement to distribute drugs can sometimes 'rationally be inferred' from 'frequent contacts' among the defendants and from 'their joint appearances at transactions and negotiations.'" United States v. Evans, supra.

In addition to relying on evidence of specific drug transactions between the alleged coconspirators, the State relies on phone records showing communication between them to prove the conspiracy. The defendants in this case share a common interest not only in Dilaudid, but in the car repair and sales business, and in the

business of raising gamecocks. In addition, there is evidence of personal friendships between various defendants and their family members. Accordingly, under the circumstances of this case, we attach no evidentiary significance to the voluminous phone records showing contact between the alleged coconspirators since there is no evidence of the content of those calls. 7

As we stated above, the evidence that during 1986 and 1987 appellants Lee Gunn, Moss, Evelyn Gunn and Childers conspired together to import and sell Dilaudid is sufficient to withstand their directed verdict motions. We find the only evidence in the record shows that appellant Moss withdrew from the

7We do find the phone tap evidence obtained in Philadelphia probative but we do not reach the admissability of this particular evidence since it is cumulative to other evidence in the record. State v. Blackburn, 271 S.C. 324, 247 S.E.2d 334 (1978).

conspiracy in 1987 or 1988, and that this withdrawal was communicated to all coconspirators. See State v. Woods, 189 S.C. 281, 1 S.E.2d 190 (1939). Consequently, transactions between Moss and others after this time cannot be used to connect those individuals to the Gunn Conspiracy. Accordingly, we do not consider the alleged sale to Olin Thompson in Gastonia, nor the alleged transactions between Moss and appellants Ronnie and Hazel Carpenter since they occurred after 1988. Unlike the State, we find no evidence that Moss ever rejoined the Gunn Conspiracy.

Reviewing the remaining evidence against Thompson, we find only evidence of a single possible sale by Gunn to Thompson near Grover, North Carolina. A single sale, without more, does not make Thompson part of the Gunn Conspiracy.

United States v. Fox, supra. Thompson is entitled to a directed verdict.

We reached a similar conclusion with respect to appellants Ronnie and Hazel Carpenter. There is ample evidence they dealt in Dilaudid (mostly we note, in North Carolina) but no evidence they were part of the Gunn Conspiracy. Similarly, there is no evidence to connect the Smith brothers to the Gunn Conspiracy. These five appellants are entitled to directed verdicts.

Applying the test outlined in State v.Amerson, supra, [8] we hold the evidence showed several conspiracies where the indictment alleged only one. The State,

[8]The factors to be applied in determining whether, in the totality of the circumstances, the proof shows one or more conspiracies are (1) the time periods involved; (2) the places where the conspiracy(ies) allegedly occurred; (3) the persons charged; (4) the overt acts or other descriptions of the offenses alleged which indicate the nature and scope of the activities being prosecuted; and (5) the substantive statutes alleged to have been violated.

relying on federal cases, argues that before any appellant is entitled to relief because of this variance between the crime charged and the offense proved, he must prove sufficient prejudice. This argument fails to comprehend the difference between federal and state law on the issues of variance. In South Carolina, "[I]t is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment." State v. Cody, 180 S.C. 417, 186 S.E. 165 (1936). A material variance between charge and proof entitles the defendant to a directed verdict; such a variance is not material if it "is not an element of the offense." State v. Hiott, 276 S.C. 72, 276 S.E.2d 163 (1981). Clearly a variance between

the conspiracy charged and the conspiracy proved constitutes a material variance.

D. Prosecution Witness Impeachment

The State's crucial witness was defendant Roxanne Gregory. As its brief acknowledges, "[a]ll Appellants, however, had one thing in common: all dealt direct with Roxanne Gregory...." Appellants contend the trial court committed reversible error in refusing to allow them to inspect a SLED file and to use its contents to impeach Roxanne. We disagree.

In 1986, Roxanne's mother was arrested on drug charges. Her initial cash bond was reduced to a personal recognizance bond by a magistrate. Following a SLED investigation into this bond reduction, the magistrate resigned. During trial, appellants' counsel became aware of this incident, and of allegations that the SLED investigation found the bond

reduction came about after Roxanne agreed to a sexual encounter with the magistrate. Appellants sought to inspect the SLED file and to use its contents to impeach Roxanne.

The trial judge inspected the file in camera and refused to permit appellants access to it. He ruled the prejudicial content of the file outweighed its probative value, and held its impeachment value was merely cumulative to other available evidence impeaching Roxanne. He also ruled the material was not Brady [9] material. We disagree.

Impeachment evidence must be disclosed pursuant to a Brady request. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); State v. Bryant, ___ S.C. ___, 415 S.E.2d 806 (1992). Our review of this file convinces us that disclosure of it to the

9Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed 2d 215 (1963).

appellants would have provided them with a good faith basis for seeking to impeach Roxanne for false swearing, if not for attempted bribery or bribery of a judicial officer. See State v. McGuire, 272 S.C. 547, 253 S.E.2d 103 (1979)(a witness may be impeached by past conduct which fairly tends to affect her credibility if the questioner has a good faith basis for asking the question). The trial judge erred in weighing the evidence's prejudicial impact against its probative value where the issue was whether to allow a critical witness's, rather than a defendant's impeachment.

The State argues, however, that the evidence in the SLED file was merely cumulative to other evidence impeaching Roxanne's credibility. At trial, she admitted she as a drug user, that she initially lied to officers about her knowledge and involvement in the Dilaudid

business because she was a junkie, that she had prior convictions for possession of marijuana and forgery, and that when she was a junkie she would, and had, done anything to support her habit, including lying, cheating, stealing and prostitution. Failure to disclose Brady material is reversible error only when its omission deprives the defendant of a fair trial. State v. Thompson, 276 S.C. 616, 281 S.E.2d 216 (1981). The exclusion of impeaching evidence is not prejudicial where it has no meaningful impact on a witness's credibility. State v. Ferguson, 300 S.C. 408, 388 S.E.2d 642 (1990). In light of the abundance of other evidence detailing Roxanne's unabashed disrespect for the law, appellants cannot establish that the trial court's ruling denied them a fair trial. State v. Thompson, supra; State v. Ferguson, supra.

E. Jury Charge

Appellants contend the trial court committed reversible error in refusing to charge the jury that, under the conspiracy count, it must find beyond a reasonable doubt the conspiracy in fact occurred in both York and Cherokee Counties as alleged in the indictment before it could find them guilty of this charge. We disagree. While jurisdictional allegations must be proved by the State and ordinarily are submitted to the jury, it is well-settled that the failure to submit this question to the jury is not reversible error where there is no conflict in the evidence. State v. Bostick, 243 S.C. 14, 131 S.E.2d 841 (1963); Compare Posey v. State, 250 S.C. 55, 156 S.E.2d 340 (1967; State v. Henderson, 285 S.C. 320, 329 S.E.2d 448 (Ct. App. 1985). Here the undisputed evidence shows acts in furtherance of the conspiracy in both counties, as well as

up and down the Eastern seaboard. The trial judge did not commit reversible error in refusing this request to charge. The conspiracy convictions of appellants Lee Gunn, Evelyn Gunn, Earl Childers, and Harold Moss are affirmed.

F. The Conclusion

We take this occasion to remind prosecutors of the pitfalls inherent in mass conspiracy trials. More than forty years ago this Court stated, "It is always cumbersome to try a great number of defendants at one time....With such a large number [of defendants] there might be a danger of some of them being lost sight of by the jury, and their case considered by the jury in a vague way." State v. McIntire, supra.

Here, the State concedes the evidence produced at trial showed a number of "relationships intertwined in a confusing jumble of ways." As an appellate

tribunal, we have had the opportunity to searchingly review the voluminous transcript generated by this prosecution, and to reflect upon the numerous issues raised. This was not a luxury afforded the trial judge or the jury. Separate indictments, with separate trials, and a sharper focus on the alleged conspirator's agreement, would have aided in the refinement of the State's case. Sec, e.g., United States v. Sperling, 506 F.2d 1323 (2nd Cir. 1974).

As the United State Supreme Court cautioned:

> There are times when necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are

exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.

Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenie nces or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become

careless or complacent when that fashion has become rampant over the earth. Kotteakos v. United States, supra. The State Grand Jury has undertaken a difficult mission, requiring the exercise of caution and discretion to insure justice is achieved.

We reverse the conspiracy convictions of appellants Olin Thompson, Ronnie Carpenter, Hazel Carpenter, Cliff Smith, Ed Smith, and Ken Smith for lack of evidence. We affirm the conspiracy convictions of appellants Lee Gunn, Evelyn Gunn, Harold Moss and Earl Childers. We vacate the substantive trafficking convictions of appellants Lee Gunn and Harold Moss. Accordingly, these appeals are

REVERSED IN PART, AFFIRMED IN PART, AND VACATED IN PART.

Harwell, C.J., Chandler, Toal and Moore, JJ, concur.

Finney, A.J., dissenting.

APPENDIX D

STATE OF SOUTH CAROLINA)	
)	IN THE COURT
)	OF GENERAL
)	SESSIONS
COUNTY OF CHEROKEE)	
State of South Carolina)	
)	
-vs-)	
)	
Lee Edward Gunn, Evelyn)	
S. Gunn, Olin Dewitt)	MOTION TO
Thompson a/k/a "Big O",)	PRODUCE ON
Bruce Walter Hodges,)	BEHALF OF
Robert Francis Leggeri)	JAMES CLIFFORD
a/k/a "Otis", Olin)	SMITH, EDWARD
McDaniel Martin, Charles)	JOE SMITH,
E. Martin a/k/a "Charlie")	KENNETH LEE
Lee Edward Gunn, Jr.,)	SMITH, RONALD
a/k/a "Junior", Harold)	CLAYTON
Glenn Moss, Barbara)	CARPENTER AND
Roxanne Gregory, Robert)	HAZEL RUBY
Earl Childers, a/k/a)	CARPENTER
"Sherman", James)	
Clifford Smith, Joe)	CASE NUMBER:
Billy Barrett a/k/a)	89GS4604001
"Bill", a/k/a James)	
David Goodman, Sandra)	
Mayo Mason a/k/a "Sandy")	
Rodney R. Wagenknecht)	
a/k/a "Possum", Wade)	
Hampton Bright, Jr.,)	
Patricia Suzanne Wiley)	
LaBarbera, Joseph R.)	
La Barbera, Willie Mae)	
Gregory a/k/a "Billie",)	
Sabrina Rochelle Gregory)	
Cindy Deese Faile,)	
Christopher Lynn)	
Hunsucker a/k/a "Chris",)	
Betty Sapp Hinson,)	
Melanie Diane Griffin,)	
Melody Dawn Pelzer,)	

Bobby Wade Collins, Frank Soda, Jr., Robert Preston Algeo a/k/a "Bob", Ronald Clayton Carpenter, a/k/a "Ronnie", Hazel Ruby Carpenter, Edward Joe Smith, Kenneth Lee Smith and Timothy Lee Millwood	)
Defendants	)

TO: CAMERON CURRIE, CHIEF DEPUTY, ATTORNEY GENERAL:

YOU WILL PLEASE TAKE NOTICE that the undersigned on behalf of the above named defendants will move before the Presiding Judge of the Cherokee County Court of General Sessions on December 7, 1989 at 10:00 a.m., or as soon thereafter as counsel may be heard, for an Order requiring the state to produce on investigative notes and statements in the possession of SLED concerning events leading to the resignation of former York County Night Magistrate David Rawlinson. This motion is made upon the following grounds:

1. The undersigned is informed and believes that this information bears directly upon the credibility of potential State's witnesses, Defendants Willie Mae Gregory and Barbara Roxanne Gregory.

Respectfully submitted,

Jim Fewster
P.O. Box 4795
Rock Hill, SC 29731

Keith A. Gatlin
P.O. Box 904
Rock Hill, SC 29731

ATTORNEYS FOR JAMES CLIFFORD SMITH, EDWARD JOE SMITH, KENNETH LEE SMITH, RONALD CLAYTON CARPENTER AND HAZEL RUBY CARPENTER

BY:_____

Rock Hill, South Carolina

November , 1989

THE COURT: I'll be back in York in the morning. Probably be back in the office this afternoon. Anything further?

MS. CURRIE: Nothing from the state.

THE COURT: If not, we're going to take up in chambers, Mr. Fewster and Mr. Gatlin are going to take up a matter in Chambers.

(Whereupon, the following takes place in chambers in the presence of the court, Ms. Currie, Mr. Fewster, Mr. Gatlin and court reporter)

MR. FEWSTER: Judge, of course, I don't know what's in the file.

THE COURT: I understand that. That's why I thought I would be of some assistance.

MR. FEWSTER: Well, it's our position that there was or is a statement made by Roxanne Gregory which would admit what would constitute a crime of moral

turpitude, bribery or attempted bribery of a public official.

THE COURT: Well, let me say this. Let's put it on the record where we are in terms of this. There was an investigative file by SLED that touched on Roxanne and a magistrate in York County. And the defense counsel has indicated they want access to that file for the purpose of using it in cross examining her if she were a witness for the state.

I met with counsel and the state's attorney on December 7th at which time the matter was discussed off the record, and at which time I indicated to counsel if they had some authorities about parameters of cross examination that I would be glad to hear from them on that, from the state.

But that my initial impression was that unless there were a conviction of a

crime of moral turpitude that I would not be particularly inclined to let the matter be gone into. And the file was investigated; the file was submitted to me with the understanding I would examine that file and then hear further from defense counsel and the state on the record, and that's where we are right now.

I'll be glad to hear further from you, but I am satisfied and confident, after looking at that file, that there is no material that would be of benefit to defense counsel. And that even if arguably there were any probative value that would tend to have would be greatly outweighed by the divisiveness and the prejudicial matters that were gone into in that file.

And I rest myself on that record. And, of course, if it later becomes necessary

you need it for appeal purposes, somehow or other it's going to be available.

I'm going to turn it back over at this time to the state's attorney. But I am extremely confident in my own mind of my ruling on that. And anything further you want to say? And, of course, one's always in a position of changing their mind. I'll hear further if you want me to.

MR. FEWSTER: If I could just--is your ruling premised upon that there is nothing in there that would be, would bear upon the credibility of the witness or that because there was not a conviction--

THE COURT: No, no.

MR. FEWSTER: ---it could not be brought up?

THE COURT: No, not--well, I think that's a pretty good ground rule in terms of conviction. But even beyond that point, I'm saying based on the material

in that file, based on the material in that file, that there is no sound basis to permit defense counsel to raise questions of cross examination on.

MR. FEWSTER: Well, if it were based upon the latter,
I think I've got some law which I think would support our
position that regardless of whether there's a conviction of a crime of moral turpitude or not--

THE COURT: I understand that and I'm going--I'm going to that very point, that I considered it all. And any probative value that it might have would just be great prejudice, including prejudice resulting to the state and including the, what I would view as unfairness.

Additionally, just divisive. Of course, I know counsel wants everything they can get; I understand that I and I appreciate that.

But I'm confident that at some future point the attached circumstances, were they not involved in the defense, that you would come to the same conclusion. I'm not asking you to concede that. Not asking you to concede that.

MR. FEWSTER: There will be a record of what's in here for this trial?

THE COURT: This record is being made and this file is being retained.

MRS. CURRIE: Your Honor, could I suggest that since the file is somewhat in dispute that it be retained by the clerk of the state grand jury rather than by the attorney general's office.

THE COURT: I think that would be appropriate. I have no problem letter you hand that over to her for that purpose.

APPENDIX F

Appendix F is the sealed SLED investigative file which is presently in the custody of the clerk of court.

BY MR. ROBERTS

Q My name is Melvin Roberts. I represent Earl Childers. Do you remember visiting alone with the night magistrate in Rock Hill in his deserted office in the nighttime to get your mother out of jail?

MS. CURRIE: Your Honor, I think we need to approach the bench.

THE COURT: Come up, counsel.

(Bench conference held off the record in the presence of the jury but out of the hearing of the jury.)

THE COURT: Move on, Mr. Roberts, please.

Q Have you ever gotten any other people started on drugs?

A I wouldn't think so.

THE COURT: Now, Mr. Roberts, I am going to take up your matters in chambers with your client and the other counsel if they want to be present. We can do that. Set up back there, ma'am.

(The following takes place in chambers.)

THE COURT: Mr. Roberts. Somebody can have as many seats as there are chairs. I'll just stand.

MR. ROBERTS: May it please the Court, I want to put on a proffer for the record of what we believe the evidence would show if permitted to question Roxanne Gregory. I don't know. I understand you have some records, the Court has some records, that was concerning this matter with regard to maybe possible Brady material and impeachment material.

THE COURT: And impeachment material.

MR. ROBERTS: It is my position--and impeachment material or whatever. I don't know. I haven't seen it. I'm not privy to it. I would like for the record to show that.

So I really don't know what it contains. The Court does.

But it's my position that she would testify if asked that her mother was in jail in Rock Hill. This was two to three years ago. The magistrate set a bond, a surety bond, of $20,000 that she couldn't make. This was in the nighttime, early night, or something. It was after office hours were closed. She and the night magistrate went alone into his office in the nighttime and whatever happened there, within two hours of the time he initially set a $20,000 bond he let her out on her own recognizance; that the magistrate made several phone calls to a phone number she had given him and after

a SLED investigation the magistrate resigned.

I believe that it would show a bribery of a public
official or at least attempted bribery of a public official which would be impeachable material.

THE COURT: All right. Do you wish to say say anything?
Otherwise, I'll make a statement.

MS. CURRIE: No, Your Honor.

THE COURT: I am satisfied in my view of the file that the file does not contain any Brady material. Additionally I will rule that the file would reflect that, and the Supreme Court will have it because I think I made it a Court's Exhibit for you, I guess, at some point in time, if and in the event necessary, whatever, the material would reflect that the material is for impeachment purposes, probative value along that line; that the

prejudicial effect would greatly outweigh the probative value it might have for impeachment purposes or any other purposes.

At this point in time I can additionally say that even if it were available it would obviously certainly be cumulative to any testimony the witness gave. It's some of the statements she made from the witness stand herself that she would do anything to get pills, and along that line.

Do you see what I'm saying? That is my ruling. You're on the record.

MR. BROWN: Yes sir, I understand. If I might just make this---

THE COURT: Make whatever statements you want to make.

MR. ROBERTS: I don't believe, or at least I don't remember or recall, any testimony relative to her attempting

to bribe or bribing a public official, which I submit this would show.

THE COURT: I stated my matter on the record.

MR. ROBERTS: Yes, sir.

THE COURT: But you're on the record on that point. That's consistent with the ruling that I gave earlier. If that's wrong, I'm wrong. I don't like to be wrong, but if I'm wrong, I'm wrong. In the event that it is necessary in the future for you, you have it on the record. Do you understand?

MR. ROBERTS: Yes, sir.

(Whereupon, Court adjourned at 8:30 p.m.)